

THE DIGITAL ECONOMY BILL, SECTIONS 42 & 45: A COMMENTARY

OVERVIEW

1. Clauses 42 and 45 devolve significant power to the Secretary of State. Clause 17 has already been removed for this reason. Clauses 42 and 45 should also be removed.
2. Moral rights - no provision in the Bill to compel publishers to attribute - the first step for orphan status.
3. Moral rights - Germany and France have strong moral rights and publishers/consumers of content are profitable. The argument of "too expensive for publishers" is nullified by this reasoning...
4. Metadata - insecure and stripped without regard. No technical solution.
5. Market rate - there is no such thing. Each image is subject to the operating costs of its creator, the rarity and subject. Art cannot ever be a commodity.
6. Diligent search - there is no mechanism or method for finding the creator of an image. No statement detailing how this will work from HMG.
7. Rights of the subject - commercial photographs require a signed model release, often with clauses stating precise terms of use. Some subjects could be Wards of Court or on At Risk register. No statement from HMG/IPO explaining how this will be controlled.
8. Contractual exclusivity - no photographer will be able to license an image on exclusive basis. The image may well be in use elsewhere as an orphan. Exclusive licenses cost more....
9. Liability - an "orphan" used here in the UK, but registered in the US. This could expose the UK user to \$300k damages per infringement. There is no mechanism to search the US register for images....

THE CONSTITUTIONAL PROBLEM

The primary reason why Section 17 was struck from the Bill on 3rd March and replaced with a new amendment was the constitutional problem of vaguely-defined provisions of that Section being subsequently implemented by secondary legislation without the proper supervision of Parliament. Section 42 suffers from the same constitutional problem: major detail has been devolved to statutory instruments. If Parliament is to have any clear idea of what it is legislating Section 42 should be struck and replaced with a properly defined amendment. Section 45, which appears to exist only to confer massive powers upon the Secretary of State to amend

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existing legislation via statutory instrument, should also be struck, for the same reason.

MORAL RIGHTS

Philosophers and economists from Adam Smith to Friedrich Hayek agree that a properly functioning market depends upon strong, enforced property rights. The property rights of owners of Intellectual Property can only be properly enforced by the mandatory assertion of their Moral Rights. This point of principle is entirely separate from the problem of retaining that rights data in the metadata of digital image files. The Government appears resolute in its determination to protect the rights of corporate holders of IP. Unfortunately it appears to be rather less resolute in its determination to protect the rights of private creators of IP, such as individual professional photographers, illustrators and others. Any photographer's name is their reputation and brand, and it is virtually impossible for any business to operate in enforced anonymity. The Digital Economy Bill as currently drafted fails to address this problem; indeed, it worsens the position of individual content creators. No statement issued by the Government or IPO has satisfactorily addressed this concern.

MORAL RIGHTS IN GERMANY

Since 2002, German content creators have enjoyed inalienable moral rights that cannot be revoked or traded. Germany clearly has:

- an equivalent of the BBC
- an equivalent of the British Library
- an equivalent of H. Bauer Publishing
- a local News International operation.

All of these organisations seem to function satisfactorily, apparently unencumbered by their legal requirement to honour the moral rights of their contributors. Germany is not a publishing wilderness, so why should the UK become one, if content creators are granted inalienable moral rights?

Similar effective moral rights regimes exist in many European countries, all deriving from France's "droit d'auteur". Even countries such as Ghana, Hong Kong, Algeria and China now recognise inalienable moral rights as a civil right of the author, distinct from any property rights. It is the UK that is dragging its feet here.

INSECURE METADATA

Author's identifying information, licensing terms, captions and other data may be stored within a digital image file as "metadata". There is a fundamental problem: no existing digital image file format is capable of preventing the easy removal of this metadata, and with it the author's identifying information. In most cases this metadata is routinely removed without the user's knowledge: photographs uploaded

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to most photographic or social networking websites such as Flickr or Facebook have their metadata stripped as part of the process; most commonly-available photo manipulation software (including professional software such as Adobe Photoshop) by default removes metadata during conversion of images to web-friendly file formats. Consequently, it must be assumed that any image uploaded to the Internet in any form or manipulated by a third party in any way is a candidate for inadvertent orphaning. The massive worldwide installed base of insecure image file formats and metadata-stripping software effectively precludes any straightforward technical solution to this problem.

Government has stated that it has already made metadata removal illegal under the Copyright, Designs and Patents Act 1988 amendment 296ZG of 2003. They may think they have, but the law is unenforceable. It is necessary to prove that removal was done with deliberate intent to infringe, facilitate or conceal infringement. In an environment where accidental removal is endemic, this get out of gaol card allows metadata to be erased with impunity. No statement issued by the Government or IPO has satisfactorily addressed this concern.

THE “MARKET RATE” MYTH

There can be no mechanism for determining the accurate market rate for any piece of IP without knowledge of its provenance. It is well established that artworks lacking provenance cannot be properly valued, and that works previously wrongly attributed, for which the correct artist subsequently has been identified, have been drastically re-valued. Is my rumpled bed worth as much as Tracy Emin’s? Probably not, but if it looked the same to an inadequately-informed observer it might easily be over-valued. The converse might also easily happen.

There can logically be no such thing as a “market rate” for orphan photographs, in the same way that there is no “market rate” for art. Consequently, there can be no mechanism by which a licensing body might determine a “fair license fee” for any specific orphan. No statement issued by the Government or IPO has satisfactorily addressed this concern.

“CONTEMPORARY PHOTOGRAPHY”

Lord Young has stated in his letter of 23rd. February to Lord Clement-Jones that “if we find, through consultation, that certain types of works, for example contemporary photography, cannot be included in this framework without causing harm to rights holders then we will have the flexibility to exclude them from the schemes.”

How is “contemporary photography” to be defined? How is it to be reliably identified? If a reliable definition is possible, why is it not in the Bill? No statement issued by the Government or IPO has satisfactorily addressed this concern.

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A “DILIGENT SEARCH”

”Diligent search” is an oxymoron where photographs are concerned. Over 1 million photographs are uploaded to Flickr alone, every single day. Nobody knows how many billions of photos are on the Internet, let alone which are original works of contactable authors. As many as 90% of the billions are infringing copies according to America Society of Media Photographers attorney Vic Perlman’s testimony to US Congress in 2007. There is no half-baked, let alone diligent search mechanism for finding their rightful owners. Diligent search would require visual search capabilities that simply do not exist today. Text searches are especially liable to fail given absent bylines and erased metadata. In fact, were there any remotely effective means of identifying owners of orphans there would be no “huge orphans problem” in the first place and no opportunity to legislate their use.

RIGHTS OF PERSONS DEPICTED IN PHOTOGRAPHS

Commercially made photographs for private purposes are prevented from publication without permission of the subject by the 1988 CD&PA. Also many photographers working for charities in sensitive areas do so with the explicit agreement that availability will be restricted to appropriate contexts. Photos of children have often been made on the strict understanding that those pictures will have limited, defined, uses made of them. Some children depicted in such photographs could be Wards of Court or on the At Risk register and have special privacy rights. By definition, it is impossible for a licensee of an orphan photograph to know positively whether or not any of this applies. No statement issued by the Government or IPO has satisfactorily addressed this concern.

ORPHANS REGISTER

Government proposes that all licensed works shall be available for inspection in a register, so that relevant authors may reclaim their copyright and a proportion of licensing fees. Photographers are already obliged to expend large amounts of time and effort searching for and deterring infringing use. This register, or registers – the nature and number of which is being deferred until the Secretary of State can hopefully come up with a workable scheme – will demand every photographer in the UK periodically search in case any of his work has become orphaned and licensed by third parties. Why is this business burden on photographers acceptable as a means to allow others to use their work? No statement issued by the Government or IPO has satisfactorily addressed this concern.

LIABILITY EXPOSURE

There will seldom be any means of determining whether an orphan work is within the UK’s legal jurisdiction or not. Users may obtain licenses in good faith from orphan works licensing bodies that turn out to be invalid because they relate to work controlled by other territories, and will then be liable for infringement within

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foreign legal jurisdictions.

This is a particularly serious risk with orphans that may belong to US photographers. The US has an aggressive culture of copyright litigation enabled by statutory damages of up to \$300,000 for infringement against US Copyright Office registered works. USCO was designed to provide this additional protection to known authors. Unknown authors cannot be identified from online search of USCO text records and diligent search cannot eliminate this risk.

Model releases, exclusivity agreements, property releases and publicity rights may all give rise to further claims. Companies with US offices will have no luck in deflecting US attorneys by waving a UK orphan licence.

This raises the problem of consequential liability that could accrue to HM Government when a licensee sues because they were granted an Orphan Licence to something quite well known elsewhere after their diligent search did not show up anything. The licensee will get sued by the original rights holder, will wave the licence, and then counter-sue the issuing authority. If this is not a possible scenario, then an Orphan Licence is totally worthless, as it will offer no protection. No statement issued by the Government or IPO has satisfactorily addressed these concerns.

CONTRACTUAL EXCLUSIVITY

Section 42 may also undermine the ability of UK professionals to undertake exclusive contracts, since it will never be possible for them to guarantee that the work will not be orphaned and may be licensed to third parties including competitors. These rights of exclusivity are guaranteed by international law, the Berne Convention and WTO TRIPS agreement, to which UK is a signatory. No statement issued by the Government or IPO has satisfactorily addressed this concern.

CONSULTATION

The Government has stated that it intends to leave details of the implementation of Section 42's provisions to the results of an extensive consultation process. Consultation concerning copyright and orphan works has been taking place for at least five years, primarily as part of the Gower and Lammy enquiries. Last Wednesday, Lord Fowler made clear his opinion of "consultation" with reference to Clause 17:

"The noble Earl, Lord Erroll, and I are on the same side for once. It is Clause 17 that we need to address. Whatever the Government say about consultation, the measure will end up as an order which the House can accept or reject, but which it cannot amend. That is a fundamental defect in something that we are doing here. The Minister talks about consultation. Although he was not the Minister responsible at the time, I have to say that we have been down the consultation path before with

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Ministers from his department. We had what was described as the biggest consultation in history on the BBC charter. It was a major consultation and all kinds of people were asked about their views. The only trouble was that the department took not the slightest notice of the result of the most important part of that consultation. That is why we have the BBC Trust. Virtually everyone told Ministers at the time that the BBC Trust was a bad idea that would not work and would create a divided structure at the top of the BBC. What did the department do? It said, 'We are not consulting on that bit. We are consulting on other parts'. I am not content, frankly, to receive only vague assurances on consultation."

Photographers confirm that "the department took not the slightest notice of the result of the most important part of that consultation" in reference to orphan works. Last Wednesday Peter Jenkins, a professional photographer, received the following text in an email from the IPO:

'The text of the clause as amended requires a diligent search (not reasonable) and includes a definition of orphan work that is almost exactly co-terminous with the EU definition. As such there doesn't appear to be any basis at all for the last few points.

As for your previous e-mail about Germany, I'm afraid I have little knowledge of their publishing industry. You're welcome to draw parallels with them if you wish, but Ministers will look at the situation in the UK when making policy decisions.'

However, in a previous email discussing the failure of the attempt to pass orphan works legislation in the USA, the same IPO officer had written:

'The US system took a completely different approach under a different legal system. I don't see how the comparison is helpful. I would look instead at the Hungarian system, which was set up successfully last year or other examples from within the European economic area.'

Clearly and demonstrably, and in accordance with Lord Fowler's opinion, the IPO is somewhat selective in its approach to information-gathering.

In May 2006, the Gowers Commission asked the following question to The Association of Photographers, and received this response:

"(k) What could be done to improve 'licence of right' provisions and business awareness of them?"

The right to assign copyright in equity weakens our position with respect to other countries such as Germany. Unfair Contract terms legislation in the UK does not apply to contracts concerning the creation or transfer of intellectual property rights, we believe that the grant of an exclusive licence or the wholesale transfer of copyright ownership should be balanced by the applicability of Unfair Contract Terms Act 1977 to IP contracts and by a statutory recognition that compensation should be equitable."

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The NUJ, in response to that questionnaire, stated:

"The National Union of Journalists therefore believes that legislation is required to regulate contracts governing copyright licensing, and to encourage collective negotiation of minimum terms agreements. The law on authors' rights contracts passed in Germany in 2002 provides a model. It is, contrary to some accounts, light-touch regulation in that its primary function is to encourage negotiation of minimum-terms agreements between authors' and publishers' bodies".

The IPO have repeatedly been told of our concerns and referred to the successful German model of inalienable Moral Rights. It would appear from the above that the IPO have taken not the slightest notice of our concerns or researched the implementation and operation of the German model, but are quite happy to misquote the EU definition of an orphan work when it suits them. The IPO's stance is obviously and clearly one of hearing only what they want to hear.

"ONEROUS" OBLIGATIONS OF PUBLISHERS

Photographer Peter Jenkins has received the following in an email from the IPO:

"As I am sure you understand, sectors of the publishing industry believe that extension of moral rights, including mandatory attribution of photographs would add an administrative and financial burden to their operations, as well as limiting their editorial freedom."

This is the same publishers' objection that blocked effective moral rights from the 1988 CD&PA. The laxity at identifying authors that ensued is a reason why they find themselves awash with orphans now. Publishers already need to mark-up copies for payment of contributors, a procedure that would be redundant had they by-lined work. The "financial cost" would be that publishers would be less free to mark-up "await invoice" from some unknown photographer whose details they have mislaid, and who will seldom get to learn about the use. Please refer to comments about the present situation in Germany and the apparent health of the German publishing industry, notwithstanding its legal obligation to honour contributors' moral rights.

Photographer Andrew Wiard added the following to me in reply:

"I) Burden? What burden? My party trick on the rare occasions I speak about this is to whip out that day's edition of the International Herald Tribune. This experiment is endlessly repeatable with predictable and consistent results. Every item on every page is sourced. Not always to the author, it could be to an agency. But, every item is sourced. They do not do this for our benefit but the readers'. They have done this for decades. It is clearly practical, and does not lead to bankruptcy.

They could equally identify the author in every case.

It is worth pointing out, by the way, that I am here referring specifically to the right

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of paternity. Publishers are much more frightened by the right of integrity (What do you mean, I can't re-write his copy??). As photographers we are, rightly, equally insistent on this right, but the exceptions (news reporting, papers, magazines etc) can be, and now are, addressed separately in the CPDA 1988.

2) The right of paternity is equally advantageous to publishers. It means they can identify authors and clear rights without having to go through a tortuous orphan works procedure. It also means they are one phone call away from checking if there are any restrictions, such as model releases, or territorial licenses, they need to be aware of."

SUPPLEMENTARY

COMMENTS ON LORD LUCAS' PROPOSED AMENDMENT TO CLAUSE 168

THE AMENDMENT

168 Insert the following new Clause—

"Protection of the right to link to publicly available information on the internet

(1) The Copyright, Designs and Patents Act 1988 is amended as follows.

(2) After section 116 insert—

"116A Protection of the right to link to publicly available information on the internet

(1) A URL (Uniform Resource Locator) is not copyright material.

(2) A short extract of copyright material used to explain the significance of a URL may be permitted under 'fair use' provisions.

(3) Any copying of copyright material required to create the link and text referred to in subsections (1) and (2) shall not constitute an infringement of copyright if destroyed immediately afterwards."

There is no problem here that needs addressing. The generally accepted way to link to information available on other websites is to provide a direct link to that page of the website, opening intact in its own window. This convention is not under threat and is widely used and supported.

Amendment 168 would appear to create a major loophole through which infringers will climb. It could allow free use of any photograph as an exception, when the photograph is the 'extract' pulled from a published webpage, so long as the source is acknowledged.

It would be as if a photograph scanned from a copy of magazine "A" were to be published in magazine "B", for no payment, with that publication being regarded as "Fair Use" so long as the photographer and original magazine were credited as sources. Any photograph copied from a photographer's or photolibrary site could be used without payment. It would destroy the market for photographs entirely, with photographers, photolibraries and agencies unable to charge for any online use.

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- 1) This amendment breaches the boundaries of fair use in UK law - in what sense is the short extract referred to restricted to review, criticism, private study or news reporting?
- 2) Photography is anyway excluded from fair use in the case of news reporting
- 3) Photographs must be excluded from material used to explain the significance of a URL, as a photograph by its very nature is published whole and not in segments "extracted "
- 4) It is already legal to point to website "A", as opposed to absorbing a part of website "A" into website "B" by way of a link, and the right to point is all that is required by way of preserving free access to publicly available information on the internet.

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